CRIMINAL CONSPIRACIES IN RESTRAINT OF TRADE AT COMMON LAW.

THE federal courts have now very thoroughly settled the scope of the Sherman Anti-Trust Act of 1890. A large number of states have passed legislation making certain combinations in restraint of trade criminal, and the courts of these states have adjudged a considerable number of cases arising under such laws. New remedies are, however, being continually suggested, and it is therefore important that the ground should be cleared by an understanding of the principles of the common law affecting trade combinations. A discussion of these principles from the point of view of the criminal law will be the scope of the present article.

The first case it is believed, in which the criminality of a trade combination has been directly passed upon in a jurisdiction where no statute affecting the case exists, is that of State *v.* Eastern Coal Company.[1] This case arose on a demurrer to an indictment which charged substantially that the five defendants, consisting of four corporations and one individual (the occupations of the defendants not being stated) did "combine, confederate and conspire together by divers unlawful and fraudulent devices, contrivances and acts unlawfully to regulate the price at which coal should be sold in the City of Providence, which said coal was then and there an article of prime necessity to the public and the consumers thereof."

The court sustained the demurrer. The rationale of the decision was that monopoly was the gist of the common-law offense, and that as it did not appear from the indictment that the defendants were coal dealers, or that they had any power of control over the coal trade, they could not create a monopoly. The court put itself on record, *obiter*, as of the opinion that if a monopoly of a prime necessity of life were shown to exist, it would have been criminal.

In this case, the state in order to sustain the indictment was obliged to contend that *any* agreement to regulate the price of a prime necessity of life was criminal at common law, and the court in sustaining the demurrer necessarily decided that this was not so. The question

[1] 29 R. I. 254.

involved in the decision is briefly this: Shall business men be allowed *under any circumstances* to make agreements fixing the prices of commodities?

The Sherman Act, as interpreted by the courts, has decided this question to a considerable extent for combinations doing an interstate business, and has made illegal all agreements "restraining trade," whether reasonable or unreasonable.[1] It has been consistent, however, and has applied the same rule to labor combinations that applies to combinations of capital.[2]

At common law, on the other hand, labor combinations, agreements to strike, peaceable primary boycotts, and the like are very generally upheld, unless they go to the extent of unreasonableness, as in the case of secondary boycotts. Some regulations of capital are undoubtedly necessary, but if the law deems criminal combinations to secure a fair profit, while it upholds combinations to secure fair wages, the employer of labor bids fair to be crushed between the upward pressure of labor on the one side and the downward pressure of competition and the criminal law on the other. Competition for him is likely to become, not the life, but the death of trade.

Few of the typical trade agreements contemplate the doing of anything that is ordinarily regarded as criminal or even civilly unlawful if done by an individual. The great majority of them that have come into the courts have related to the establishment of prices, either directly or indirectly, and an individual, unless engaged in business of a public or *quasi*-public character, may fix his own prices or even refuse to sell his commodities at all, as he pleases. Accordingly it is probably necessary to resort to some doctrine of the law of conspiracy in order to impress the mark of criminality upon agreements or combinations to do things which the individual might do with impunity so far as the criminal law is concerned. To determine the criminality of such trade combinations the end sought to be accomplished and the means of accomplishing it must be examined, for it is elementary that the character of means and end is the determining feature of a criminal conspiracy.

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[1] U. S. *v.* Freight Association, 166 U. S. 290; U. S. *v.* Joint Traffic Association, 171 U. S. 505, 570; Bement *v.* Nat. Harrow Co., 186 U. S. 70, 92; Addyston Pipe & Steel Co. *v.* U. S., 175 U. S. 211; Harlan, J., in Northern Securities Co. *v.* U. S., 193 U. S. 197, 331. See 23 HARV. L. REV. 353.

[2] See Loewe *v.* Lawlor, 208 U. S. 274 (Danbury Hatters' Case).

"A conspiracy is a confederation to do something unlawful either as a means or an end." [1]

So also the courts have often said, that "before the courts can punish or prevent a conspiracy, either the act conspired or the manner of its doing must be unlawful." [2]

Two classes of cases have arisen under these definitions. Some courts have held that the means or the end must be *criminally* illegal.[3] A conspiracy to restrain competition by assaulting the customers of a competitor would fall within this class. Other courts have said that it is sufficient, if the means or the end are civilly illegal.[4] A combination to keep away the customers of another by oral false representations would come within this definition.

Either of these views, if logically followed out, would seem to be reasonable. The test, however, should relate to the conduct of the individual members of the combination, if the definition is to be of use. To argue otherwise is to say a combination is illegal because it is illegal.[5]

Some of the *dicta*, however, have attempted to extend the doctrine of criminal conspiracy further and hold that a conspiracy is criminal if it is "to effect a purpose which has a tendency to prejudice the public." The case most frequently cited for this proposition is State *v.* Buchanan,[6] but the statement there contained was clearly *obiter*, and it is doubtful if there is any decided case which must necessarily be supported on this ground. If the doctrine were well founded any trade agreement which the court thought had a tendency to preju-

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[1] State *v.* Bacon, 27 R. I. 252. See also King *v.* Jones, 4 B. & Ad. 345; Richardson Case, 1 M. & Rob. 402; People *v.* Clark, 10 Mich. 310; Jetton-Dekle Lumber Co. *v.* Mather, 43 So. 590, 591 (Fla.); State *v.* Stevens, 30 Ia. 391; State *v.* Keach, 40 Vt. 113.

[2] Jetton-Dekle Lumber Co. *v.* Mather, 43 So. 590, 591.

[3] Commonwealth *v.* Hunt, 4 Met. (Mass.) 111.

[4] State *v.* Bacon, 27 R. I. 252. The weight of authority in the United States may be said to be in accord with this view.

[5] See Wright on Criminal Conspiracies (Carson's Notes), p. 50, where Mr. Wright says: "Moreover, in whichever of these senses (*i. e.*, criminally or civilly) the word 'unlawful' is used, it must, if it is to be the defining word in the definition of criminal combinations, mean unlawful with reference to the conduct of an individual; for if it is meant unlawful with reference to combinations it would do nothing for defining the meaning of 'unlawful' as applied to combinations, and it would be merely a restatement and not a definition."

[6] 5 Har. & J. 317 (Md., 1821).

dice the public might be held criminal, and an economic rather than a legal test would be the basis of the decisions.[1]

What, then, is the status of the authorities at common law relating to trade agreements?

In England the crimes of forestalling, engrossing, and regrating were early recognized. They are defined by Stephens in his "History of the Criminal Law of England" [2] as follows:

"Forestalling, engrossing, and regrating was the offense of buying up large quantities of any article of commerce for the purpose of raising the price. The forestaller intercepted goods on their way to market and bought them up so as to be able to command what price he chose when he got to the market. The engrosser or regrator — for the two words had much the same meaning — was a person who, having bought goods wholesale, sold them again wholesale. This was regarded as a crime."

It is uncertain, perhaps, how far these crimes depended upon statutory enactment. Certainly their prevention was often assisted by statute.[3]

Even by the definitions given in the various statutes, however, they are seen to be specific crimes, generally applicable to local conditions only, and the statutes do not make criminal all restraints of trade, whether reasonable or unreasonable. Some of these statutes related to forestalling, engrossing, and regrating, and others specifically fixed the price at which various commodities should be sold. Thirty-nine such statutes are enumerated in the repealing statute passed in 1844.[4]

One of the earliest of the English cases relating to restraints of trade was Rex *v.* Journeymen Tailors of Cambridge.[5] In this case the Journeymen Tailors "were indicted for a conspiracy among themselves to raise their wages," and were found guilty. Upon a motion in arrest of judgment the judgment was confirmed, the court relying upon The Tubwomen *v.* The Brewers of London.[6] This case, of course, does not concern a combination affecting commodi-

[1] See Eddy, Combinations, §§ 353, 354.

[2] Vol. iii, p. 199.

[3] For example, see 25 Edw. III, Stat. 4, c. 3 (1350), and 5 & 6 Edw. VI, c. 14. This statute and five other acts were repealed in England in 1772 by 12 Geo. III, c. 71, and the common-law offenses of engrossing, regrating, and forestalling were abolished in 1844 by 7 & 8 Vict., c. 24.

[4] 7 & 8 Vict. c. 24.

[5] 8 Mod. 10 (1721).

[6] This apparently refers to a case entitled Mr. Attorney *v.* Starling, etc., Brewers of London, 1 Keb. 650, 1 Siderfin 174, 83 Eng. Rep. (reprint) 1164.

ties, and the *dictum* in it with regard to conspiracies is not supported by later authorities. The decision may, however, be supported by reference to the Statute of 2 & 3 Edw. VI, c. 15, under which such combinations were forbidden and made criminal.

The case of King *v.* Norris [1] involved an indictment against the proprietors of salt works for combining to raise the price of salt. Lord Mansfield is reported to have said rather quaintly that

"If any agreement was made to fix the price of salt or any other necessary of life (which salt emphatically was) the court would be glad to lay hold of an opportunity from what quarter soever the complaint came to show their sense of the crime, and at what rate soever the price was fixed, high or low, made no difference, for all such agreements were of bad consequence and ought to be discountenanced."

The report of this case is obviously imperfect and it does not appear that there was any actual decision. The criminality of the conspiracy has been said to be based upon any one of three statutes which were in existence at the time.[2] Whether or not any one of these statutes will account for this case, the remarks of Lord Mansfield were no more than *dicta*. They constitute, however, probably the broadest statement of the doctrine of such conspiracies that is to be found in any reported case.

The next reported case is King *v.* Eccles.[3] This was an indictment against a combination of tailors for conspiring to impoverish another tailor, and to hinder him from exercising his trade. They were convicted, and upon motion in arrest of judgment the judgment was affirmed. The case turns upon a point of pleading rather than of law, but there is in it a *dictum* of Lord Mansfield's, similar in tone to what he said in Rex *v.* Norris, *supra*.

King *v.* Eccles clearly did not decide anything with regard to the substantive law of criminal conspiracies in restraint of trade. Nevertheless, Lord Ellenborough, in Rex *v.* Turner,[4] explained it by saying "That case was considered as a conspiracy in restraint of trade, and so far a conspiracy to do an unlawful act affecting the public."

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[1] 2 Kenyon, 300 (1758).

[2] See 37 Edw. III, c. 5; 25 Hen. VIII, c. 2; 2 & 3 Edw. VI, c. 15; Wright, Criminal Conspiracies and Agreements, p. 47; 37 Edw. III, c. 5, was repealed by 38 Edw. III, c. 2. See also 5 & 6 Edw. VI, c. 14. Salt was held to be a victual within the meaning of this statute, according to a case referred to in 3 Coke's Institutes, cap. 89, p. 195.

[3] 1 Leach 274 (1783).

[4] 13 East 227.

It must be admitted, also, that there seemed to be a quite general impression that all conspiracies in restraint of trade were unlawful. Thus in Mitchell *v.* Reynolds[1] Parker, C. J., declared, "In all restraints of trade, where nothing more appears, the law presumes them bad." This, however, was only a *dictum*, and it does not appear that "criminal" rather than civilly illegal was meant.

In 1780 the case of King *v.* Waddington[2] was decided. This was not a case of conspiracy, though it is sometimes cited as if it were. It was an indictment against an individual for spreading false rumors to enhance the price of hops, the false rumors consisting in stating that the supply of hops was almost exhausted and that there would be a scarcity of them. This was held a crime, and the defendant was fined £500 and sentenced to one month's imprisonment. The spreading of false rumors seems to have been clearly recognized as criminal independently of combination.[3] The essence of this crime seems to have been the falseness of the rumors circulated by the defendant.

The same defendant, who it appeared was a large grower and merchant of hops, was afterwards again indicted for the crime of engrossing hops.[4] The defendant being found guilty, Grose, J., passed sentence of another fine of £500 and imprisonment for three months, saying that "the particular offense of engrossing, which still remained an offense at common law, was calculated to create an artificial scarcity where none existed in reality, and to aggravate that calamity where it did exist."

Rex *v.* De Berenger[5] was an indictment for a conspiracy to raise the price of public funds by means of false rumors. The indictment was upheld. As already seen, it was illegal for an individual to raise prices by spreading false rumors. The conspiracy was, therefore, criminal within the ordinary definition of conspiracy.

Nevertheless, there are later expressions by English judges by which it appears that the effect of the early English cases was mis-

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[1] 1 P. Wms. 181 (1711).

[2] 1 East 143.

[3] See 7 & 8 Vict. c. 24, § 4, which did away with the common-law offenses of forestalling, engrossing, and regrating, and repealed the statutes relating thereto, but expressly saved the offense of spreading or conspiring to spread false rumors to enhance or decry the price of merchandise. See also Wright, Criminal Conspiracies and Agreements, pp. 24, 35, 36; Maddockes Case, 2 Rolle's Rep. 107; 3 Coke's Inst. c. 89, p. 196.

[4] 1 East 167.

[5] 3 Maule & Sel. 67 (1814).

understood. Thus in Hilton *v.* Eckersley,[1] which was a civil case not involving criminal conspiracy at all, but simply the question of enforcing a bond alleged to be in restraint of trade, we find Justice Crompton saying:

"I think that combinations like that disclosed in the pleadings in this case were illegal and indictable at common law, as tending directly to impede and interfere with the free course of trade and manufacture."

In the later English cases, however, the effect of the early cases seems to have been more clearly understood, and the courts show a tendency to recede from the earlier view. Thus in Urnston *v.* Whitelegg Brothers[2] there was a civil action to enforce a penalty under the rules of an association of mineral water manufacturers, fixing prices for ten years with a penalty for violation. It was held that the contract was not enforceable, but the court said:

"This contract is illegal in the sense of not being enforceable; it is not necessary that it should be such as to form the ground of criminal proceedings."

The inference here seems to be that the agreement would not be criminal, and the court would therefore seem to disavow the doctrine that all combinations to fix prices of commodities are criminal.

A similar opinion was entertained by several judges in the case of Mogul Steamship Company *v.* McGregor, which was a civil action for damages arising out of a combination between certain steamship companies, by which rates were to be fixed and various other methods taken to avoid the ruinous effects of competition. The case went through all the courts to the House of Lords, and it was established that such a combination, no force or fraud being used, was not actionable.

In the course of his opinion Lord Herschel[3] said:

"It has never been held that a contract in restraint of trade is contrary to law in the sense that I have indicated" (*i. e.*, in the sense that it rendered parties to it subject to criminal prosecution).

In the same case, when it was before the Queen's Bench Division,[4] Bowen, L. J., said:

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[1] 6 El. & Bl. 47, 53 (1856).
[2] 63 L. T. Rep. N. S. 455.
[3] L. R. App. Cas. 25, 39 (1892).
[4] L. R. 23 Q. B. D. 598, 619.

"Lastly, we are asked to hold the defendants' conference or association illegal as being in restraint of trade. The term 'illegal' here is a misleading one. Contracts, as they are called, in restraint of trade, are not in my opinion illegal in any sense, *except that the law will not enforce them.*"

So also in the same case Lord Watson said:[1]

"I cannot for a moment suppose that it is the proper function of the English Courts of Law to fix the lowest prices at which traders can sell, for the purpose of protecting or extending their business without committing a legal wrong which will subject them to damages."

Passing now to the American cases, we come to the early Pennsylvania case of Commonwealth *v.* Carlisle.[2] The decision in the case arose out of *habeas corpus* proceedings to obtain the release of certain "master ladies' shoemakers" who had been arrested on a charge of conspiracy for agreeing with each other not to employ any journeyman who would not consent to work at reduced wages. It also appeared that the object went no further than to establish certain rates which had prevailed a few months before, from which there was reason to believe the employers had been compelled to depart by a combination among the journeymen. The motion to discharge was made on the ground that such a combination was no offense by the common law of Pennsylvania.

Gibson, J., held that the question was whether the relators "have been actuated by an improper motive," and that the case should therefore be submitted to a jury. In the course of his opinion the learned judge said:

"If the bakers of a town were to combine to hold up the article of bread, and by means of a scarcity thus produced, extort an exorbitant price for it, although the injury to the public would be only collateral to the object of the association, it would be indictable."

This would seem to be forestalling within the decision of King *v.* Waddington.

This case shows a tendency to go as far, perhaps, as any American case, and yet the point for which it is most often cited, *i. e.* as to combining to raise the price of bread, was only a *dictum.*[3]

[1] See also Wickens *v.* Evans, 3 Y. & J. 318 (1829), *per* Hullock, B.; Jones *v.* North, L. R. 19 Eq. 426, *per* Bacon, V. C.

[2] Brightly's Rep. (Pa.) 36, (1821).

[3] This case is adversely criticized in Eddy, Combinations, § 354.

Commonwealth *v.* Tack,[1] another Pennsylvania case, was an indictment for conspiring to cheat the prosecutor by inducing him to sell oil on time, on the representation that the price of oil was to be lower; it was alleged that the prosecutor commenced to sell oil and that the defendants, by means of false rumors and by forestalling the market, caused an advance in price. The court sent the case to a jury and ruled, in accordance with the request of the defendants, "that it is not an unlawful conspiracy for them to agree to purchase oil on their joint account with a view to making a profit upon the resale," and that, in order to make the combination criminal, "it must appear that the price is to be affected by some other means than the mere naked purchase: there must be some fraud, falsehood, or deceit used and intended to affect the price, and the motive must be dishonest." At the preliminary hearing the court also said, "It was not *per se* indictable to raise the price of oil on a given day, neither was it *per se* an offense to combine honestly to do so."

This case clearly indicates that an agreement to regulate prices, where there is no fraud or illegal means used, and where the agreement is for the fair protection of the parties, would be legal.

A still later Pennsylvania case, and one often cited, is that of Morris Run Coal Co. *v.* Barclay Coal Co.,[2] which was a civil action arising out of a contract entered into by a number of dealers in coal, by which the prices of coal were to be regulated by a committee and the business of the contracting parties was to be otherwise controlled. The defense was that the contract was illegal as being in restraint of trade. The court held that the contract was a New York contract, and that it was illegal under the New York statute which made it an offense to conspire "to commit any act injurious to the public health, to public morals, or to trade or commerce." In reaching their conclusions, however, the court made various observations, all of which were *dicta*, with regard to conspiracies, among them the following:

"The influence of a lack of supply or a rise in the price of an article of such prime necessity cannot be measured. It permeates the entire mass of the community, and leaves few of its members untouched by its withering blight. Such a combination is more than a contract, it is an offense."

And again the court says:

[1] 1 Brewst. (Pa.) 511 (1868).

[2] 68 Pa. St. 173 (1871).

"Every 'corner,' in the language of the day, whether it be to affect the price of articles of commerce, such as bread-stuffs, or the price of vendible stocks, when accomplished by confederation to raise or depress the price and operate on the markets, is a conspiracy."

These *dicta* are often cited, however, to sustain the doctrine that all such combinations were criminal at common law.

In New York, also, there have been a number of cases which are frequently cited as holding that conspiracies to affect prices were criminal at common law. Among the earliest is People *v.* Fisher.[1] This case was an indictment of certain journeymen shoemakers for combining to prevent other journeymen shoemakers from working at less than certain wages, by refusing to work for shoemakers who employed journeymen who had worked for lower wages than that allowed by the association. A question arose as to the sufficiency of the indictment, and it was held that the offense was an indictable conspiracy under the New York statute making it an offense for two or more persons to conspire to commit any act injurious to trade or commerce. The court repeated in the course of its opinion the well-known maxim that "Competition is the life of trade." The court also said:

"The right does not exist either to enhance the price of the article, or the wages of the mechanic, by any forced or artificial means. . . . The cloth merchant may say that he will not sell his goods for less than so much per yard, but has no right to say that any other merchant shall not sell for a less price. If one individual does not possess such a right over the conduct of another, no number of individuals can possess such a right. All combinations, therefore, to affect such an object are injurious, not only to the individual particularly oppressed, but to the public at large." [2]

The other New York cases are all based upon the New York statute already quoted. Most of them are civil actions, and in few of them is anything said about the criminality of combinations in restraint of trade generally.[3] These cases, therefore, are not au-

[1] 14 Wend. (N. Y.) 9 (1835).

[2] See also People *v.* Sheldon, 139 N. Y. 251, which was an indictment under the New York statute of a combination of all the coal dealers except one in Lockport, N. Y. In this case there was a binding agreement among the dealers of the most sweeping kind, and there was held to be an indictable conspiracy under the statute.

[3] See Hooker *v.* Vandewater, 4 Denio 349; Stanton *v.* Allen, 5 Denio 434; People *v.* Fisher, 14 Wend. 9; Arnot *v.* Coal Co., 68 N. Y. 558; People *v.* North River Sugar Refining Co., 121 N. Y. 582; People *v.* Milk Exchange, 145 N. Y. 267; DeWitt

thority for the proposition that conspiracies in restraint of trade were criminal at common law. Nevertheless, it has been occasionally said by judges elsewhere that the New York statute was but a re-enactment or even a limitation of the common-law offenses.[1] But an examination of the English cases and early statutes must convince one that there was not at common law any broad general offense of a conspiracy to commit "any act injurious to trade or commerce," but rather a number of specific offenses relating to specific articles of commerce and to specific, well-defined methods of restraining it.

Somewhat related to the question as to the criminality of combinations is the subject of the validity (civilly) of contracts in restraint of trade, especially when they are contracts fixing the prices of commodities, dividing up territory for the sale of commodities among competitors, and the like. But the law on this subject is well settled that it is a question of reasonableness in each particular case. The courts will enforce such contracts if they are reasonable, even though trade is restrained, prices are fixed, and competition is reduced.[2]

As to what constitutes unreasonableness the courts are by no means agreed. But the fact that certain agreements in restraint of trade are invalid and unenforceable in a civil action does not constitute an argument for holding them illegal criminally. If, however, an agreement is upheld when reviewed in a civil action, it is clear that no criminal liability could ensue for entering into it.

In Kellogg *v.* Larkin [3] the question arose as to the validity of a produce association composed of mill-owners and warehousemen, in which there were various features affecting the price of wheat in the Milwaukee market, and by which the warehousemen agreed to give mill-owners "full, absolute, and uninterrupted control of the

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Wire Cloth Co. *v.* New Jersey Wire Cloth Co., 14 N. Y. Supp. 277; Strait *v.* Nat. Harrow Co., 18 N. Y. Supp. 224; Judd *v.* Harrington, 139 N. Y. 105.

[1] See Raymond *v.* Leavitt, 46 Mich. 447.

[2] See Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484; Skrainka *v.* Scharinghausen, 8 Mo. App. 522; Tode *v.* Gross, 127 N. Y. 480; Kellogg *v.* Larkin, 3 Pinn. (Wis.) 123; Ontario Salt Co. *v.* Merchants' Salt Co., 18 Grant's Ch. (Can.) 540; Herriman *v.* Menzies, 115 Cal. 16; Manchester & Lawrence R. Co. *v.* Concord R. Co., 66 N. H. 100; Wood M. & R. Co. *v.* Greenwood Hardware Co., 75 S. C. 378; Over *v.* Byram Foundry Co., 37 Ind. App. 452 ; Diamond Match Co. *v.* Roeber, 106 N. Y. 473; Leslie *v.* Lorrilard, 110 N. Y. 519; Proctor *v.* Sargent, 2 Man. & G. 20 (1840); Rannie *v.* Irvine, 7 Man. & G. 969 (1844); Benwell *v.* Inns, 24 Beav. 307 (1857); Hearn *v.* Griffin, 2 Chit. Rep. 407; Hoffman *v.* Brooks, 23 Am. L. Reg. 648, and note.

[3] 3 Pinn. (Wis.) 123.

Milwaukee wheat market." It was held that the agreement was valid, apparently on the ground that a complete monopoly was not created. The court quoted Parker, J., in Mitchell *v.* Reynolds [1] to the effect that the creation of a monopoly would be criminal; but said that "the word 'monopoly' is used to signify something which is very different from aught that could have been intended by this contract. The learned judge himself (*i. e.* Parker, J.) interprets it in another part of the same opinion. He says 'that to obtain the sole exercise of any known trade throughout England is a complete monopoly, and against the policy of the law.' He adds that when restrained to particular places or persons, if lawfully or fairly obtained, the same is not a monopoly."

So also in a number of other cases in this country it has been decided that agreements by which prices of various commodities were regulated were not invalid, generally upon the ground that an actual monopoly was not created.[2]

In Canada, also, it has been held that an agreement between persons engaged in the manufacture and sale of salt in Ontario, by which all salt manufactured by the parties to the agreement should be sold through trustees, and the price thus regulated, was valid.[3] This case was decided on the ground that no monopoly was created, inasmuch as there were other persons engaged in the production of salt in the Province of Ontario. The court in this case declared that the old common-law offense of engrossing was not in force in Canada, although no statute abolishing it had been passed there. The court said that the agreement was no more than one by which two persons bound themselves not to undersell each other, and that such an agreement would not be invalid.

The above cases were all civil cases, but certainly the courts deciding them would likewise hold that the agreements under review were not criminal. Whether they would have held that similar

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[1] 1 P. Wms. 181.

[2] Skrainka *v.* Scharinghausen, 8 Mo. App. 522 (combination among twenty-four owners of stone quarries); Manchester & Lawrence R. Co. *v.* Concord R. Co., 66 N. H. 100 (agreement between two railroad companies fixing rates); Wood M. & R. Co. *v.* Greenwood Hardware Co., 75 S. C. 378 (combination among dealers in rakes and mowers); Over *v.* Byram Foundry Co., 37 Ind. App. 452 (agreement fixing prices between two dealers in sash weights); Herriman *v.* Menzies, 115 Cal. 16 (agreement fixing prices among stevedores).

[3] Ontario Salt Co. *v.* Merchants' Salt Co., 18 Grant's Ch. (Can.) 540.

agreements, had they been so wide in their scope as to be "monopolistic," were criminal, is a question difficult to determine. Undoubtedly there is a marked tendency to differentiate agreements which create monopolies from others, but in most of the cases cited it is not stated that such monopolies are necessarily criminal. Thus in Oakdale Mfg. Co. *v.* Garst [1] the court simply said, "Monopolies are liable to be oppressive, and hence are deemed to be hostile to the public good"; and this generally is the tone of the *dicta* relating to civil cases.[2]

In some, too, the courts lay down the rule that monopolies of necessities of life are invalid. In the case of Herriman *v.* Menzies [3] the court said that "an agreement, the purpose or effect of which is to create a monopoly, is unlawful, if it relate to some staple commodity or thing of general requirement or use, or of necessity, and not something of mere luxury or convenience."

This supposed distinction between necessities and luxuries has however been repudiated by a number of courts. The great diversity of opinion as to what constitutes necessities makes the distinction one of very little value. For example, beer, alcohol, distilling products, preserves, gas pipes, powder, harrows, capsules, envelopes, wire cloth, bluestone, cigarettes, and other articles have been classed as necessaries by various courts.[4] As has been said by one judge,[5] if these articles are to be ranked as necessaries, the rule might as well be said to apply to articles of merchandise generally. Judge Taft also declared that "the introduction of such a distinction furnishes another opportunity for courts to give effect to the various economic opinions of its individual members." [6]

It must be admitted, however, that there are at least some *dicta* in the cases, if not any express decisions, to the effect that monopolies were not only invalid but criminal. In the very earliest cases the word "monopoly" was little used except with reference to franchises granted by the state.[7] The common-law offenses were grouped

[1] 18 R. I. 484.

[2] See also Alger *v.* Thacher, 19 Pick. (Mass.) 51, 54 (1837); Tuscaloosa Ice Mfg. Co. *v.* Williams, 127 Ala. 110 (1900).

[3] 115 Cal. 16.

[4] See Brown & Allen *v.* Jacobs Pharmacy Co., 115 Ga. 429, 437; Harding *v.* American Glucose Co., 74 Am. St. Rep. 268, 269, note.

[5] Fish, J., in Brown & Allen *v.* Jacobs Pharmacy Co., 115 Ga. 429, 437.

[6] U. S. *v.* Addystone Pipe & Steel Co., 85 Fed. 271.

[7] See, for example, Case of Monopolies, 11 Co. 84 *b*.

under the terms engrossing, regrating, and forestalling, but later these terms, ceased to be frequently used, and the term "monopoly" came into use as a term, always of great opprobrium, and sometimes with the declaration that it constituted a criminal offense.[1]

Here reference may be made to the recent Illinois case of Chicago, Wilmington, & Vermillion Coal Co. *v.* People.[2] This was an indictment for fixing and regulating the price of coal in the State of Illinois, and two of the counts were said to be based upon the common law, although the others were expressly based upon the Illinois statute, which was sufficiently broad to support the common-law counts also.[3] The case came before the court upon the indictment and an agreed statement of facts which showed a very widespread combination which regulated prices and sought to control the selling end of the business to a large extent. The court upheld the common-law counts as well as the others. The lower court based its decision upon the following ground:

"A combination between independent producers of coal to prevent competition in the sale of that article, which is a necessary of life, is an act inimical to trade and commerce, and detrimental to the public and unlawful, and amounts to a common-law conspiracy, regardless of what may be done in furtherance of the conspiracy."

The upper court rests its decision in part upon the *dictum* in State *v.* Buchanan, to the effect that "every conspiracy to do an unlawful act . . . for a purpose which has a tendency to prejudice the public in general, is at common law an indictable offense." It is not clear, however, whether the court rests its conclusion on the unlawfulness of the act or the prejudicial character of the purpose. It is true

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[1] See Parker, J., in 1 P. Wms. 181, 193 (1711), who said, "It can never be useful to restrain another from trading in all places, though it may be, to restrain him from trading in some, unless he intends a monopoly, which is a crime." See also remarks of counsel in King *v.* Waddington, 1 East 167; Strait *v.* Harrow Co., 18 N. Y. Supp. 224, 233; Raymond *v.* Leavitt, 46 Mich. 447; State *v.* Eastern Coal Co., 29 R. I. 254; 27 Cyc. 891.

[2] 114 Ill. App. 75, 214 Ill. 421.

[3] This statute was as follows: "If any corporation . . . shall create, enter into or become a member of, or a party to, any pool, trust, agreement, combination, confederation or understanding with any other corporation, partnership, individual or any other person or association of persons to regulate and fix the price of any article of merchandise or commodity . . . such corporation, partnership or individual or other association of persons shall be deemed and adjudged guilty of a conspiracy to defraud and be subject to indictment and punishment as provided in this act."

that, according to the well-established definitions, a conspiracy to do an unlawful act is criminal. But the court does not show in what the unlawfulness of the act consists, for to fix and regulate prices is not unlawful, as the court admits, for an individual. If the court means unlawful for a combination, the definition as already shown is useless; the argument is an argument in a circle, and the reasoning is clearly fallacious. If, however, the court bases its conclusion on the prejudicial character of the purpose, it rests upon an assumption not established by legal decisions. It cannot yet be said that the courts would hold criminal every conspiracy that has a "tendency to prejudice the public in general." It is true that a conspiracy would not be criminal unless it prejudiced the public, because this is the test of criminality; but it is quite a different thing to say that every act that, in any degree, has a tendency to prejudice the public would necessarily be held to be criminal. So far, therefore, as this Illinois case assumes to pass upon the common law, it cannot be said to be based upon sound reasoning.[1]

Furthermore, there are strong intimations in the decisions that combinations or agreements in restraint of trade are not criminal at common law. Thus Judge Taft said, in the case of United States *v.* Addystone Pipe & Steel Company:[2]

"Contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void and were not enforced by the courts."

The true distinction between actionable combinations or agreements and those which were merely void or not enforceable, based upon well-established principles of the common law, is also well stated in Brown & Allen *v.* Jacobs Pharmacy Co.,[3] where the court said:

"Or suppose that a number of merchants should agree to fix the price of certain goods, and not to sell below that price; if there were no statute

[1] This case was decided before the decision in State *v.* Eastern Coal Co., 29 R. I. 258, and was commented upon in the latter case but not followed.

[2] 85 Fed. 271, 279. See also *In re* Greene, 52 Fed. 104, 111; Wheeler Stenzel Co. *v.* National Window Glass Association, 152 Fed. 864, 873; Bowen, L. J., in Mogul Steamship Co. *v.* McGregor, L. R. 23 Q. B. D. 598, 619; Hannen, J., in Farrer *v.* Close, L. R. 4 Q. B. 602, 612 (1869); State *v.* International Harvester Co., 79 Ark. 517; Walsh *v.* Dwight, 58 N. Y. Supp. 91, 93. *Cf.* Knight & Jillson Co. *v.* Miller, 87 N. E. 823, 828 (Ind., 1909).

[3] 115 Ga. 429, 437 (1909).

on the subject, and the case rested on the common law, the agreement would simply be non-enforceable; but if they went further, and agreed that, if any other merchant sold at a less price, they would force him to their terms, or drive away those dealing with him, by violence, threats, or boycotting, it would cease to be a mere non-enforceable contract, and if, in its execution, damages proximately resulted to such other merchant, he would have a right of action."

In Kentucky it has been squarely held that it is not an indictable offense at common law to combine for the purpose of maintaining rates of insurance.[1]

It has even been doubted whether the old common offenses of engrossing, regrating, and forestalling would now be considered criminal in this country. Judge Story, for example, said:[2]

"These three prohibited acts are not only practised every day, but they are the very life of trade, and without them all wholesale trade and jobbing would be at an end. It is quite safe, therefore, to consider that they would not now be held to be against public policy."

While the contrary view seems, perhaps, to be the more prevalent one, no reported case in this country has been found upholding a criminal prosecution upon the ground that either one of these offenses had been committed.

To summarize the law in this country, therefore, it may be said:

(1) That the courts will not hold a conspiracy criminal *merely* on the ground that it has a tendency to prejudice the public; the purpose or means must be shown to be civilly or criminally illegal.

(2) There is not, under the decisions up to this time, any well-recognized crime known as a criminal conspiracy in restraint of trade, that is, *sui generis*, which will be held to be criminal when it does not come within the ordinary definitions.

(3) So far as combinations in restraint of trade are criminal at all, they divide themselves into not more than four classes: (*a*) combinations made criminal by certain old English statutes, and these are not generally regarded as being now in force in the United States; (*b*) combinations which are criminal by reason of illegality of purpose or means; (*c*) possibly combinations coming within the defini-

[1] Ætna Insurance Co. *v.* Commonwealth, 106 Ky. 864.

[2] Story on Sales, § 490; see also Black's Law Dictionary; State *v.* Eastern Coal Co., 29 R. I. 260.

tions of forestalling, regrating, or engrossing, but it is doubtful if these are now in force in this country, and they certainly are not to their full extent; (*d*) according to *dicta*, rather than decisions, combinations to create *monopolies* of necessities of life. Clearly the most usual forms of agreements among dealers in commodities to fix and regulate prices, when the prices are not unreasonable, the means used are not illegal, and the parties to the agreement do not comprise all the dealers in the community, do not come within any of the above classes.

If monopolies of necessities of life are to be held criminal at common law, many difficulties at once suggest themselves. How are necessities to be determined? What constitutes a monopoly and how wide in extent must it be?[1] Is the question of reasonableness of the rates to be considered in determining whether the monopoly is criminal?[2] Are other questions of reasonableness and unreasonableness to enter in?

The difficulties of framing any fair rule or definition brings one inevitably to the conclusion that the best solution of the problem is to say, with Judge Taft, that trade agreements are not punishable under the rules of the common law, and then to look to the legislature to pass adequate and definite measures to protect the public. Clearly some combinations, both of labor and capital, should be restrained or punished. It is intolerable that dealers in the necessaries of life should have the power to extort exorbitant profits from the consumer by any means whatever. The demands of labor are often un-

[1] For example, an agreement among all the dealers of a single city is held not to amount to a monopoly. Kellogg *v.* Larkin, 3 Pinn. (Wis.) 123. Nor does an agreement by twenty salt dealers, although a large proportion of all the dealers in a province, constitute a monopoly. Ontario Salt Co. *v.* Merchants Salt Co., 18 Grant's Ch. (Can.) 540. On the other hand it has been said, in civil cases, that it is not necessary that all the dealers in a certain community should be in a combination in order to constitute a monopoly. See Nester *v.* Brewing Co., 161 Pa. St. 473, 481, where the court said: "The application of the rule does not depend upon the number of those who may be implicated, or to the extent of space, included in the combination." In Richardson *v.* Buhl, 77 Mich. 632, 658, the court said: "All combinations among persons or corporations for the purpose of regulating or controlling the price of merchandise, or any of the necessaries of life, are monopolies and intolerable." *Cf.* definition of monopoly in Black's Law Dictionary, quoted in 29 R. I. 260.

[2] The question as to the reasonableness or unreasonableness of the prices established has been considered of importance in several cases. See Skrainka *v.* Scharinghausen, 8 Mo. App. 522; Herriman *v.* Menzies, 115 Cal. 16; Manchester & Lawrence R. Co. *v.* Concord R. Co., 66 N. H. 100; Commonwealth *v.* International Harvester Co., 115 S. W. 703, 712 (Ky., 1909).

reasonable and impose hardship, not only on the employer and the purchaser of the products of labor, but upon the laboring men themselves. A remedy is necessary, but an adequate one cannot be found in the common law as it has, up to this time, developed. The criminal law, in particular, should be definite and exact, and not be made to depend upon the shifting economic opinions of the courts. For these reasons legislation, not the common law, should, in cases relating to business agreements, define the crime as well as impose the penalty.

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